IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.8.2006

CORAM:

THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

SECOND APPEAL No.497 OF 2004

K.Anjanakumari ... Appellant/Defendant

Vs.

Bhavani ... Respondent/Plaintiff

Second Appeal preferred under Section 100 CPC as against the judgment and decree dated 26.7.2003 rendered in A.S.No.44 of 2001 by the learned Subordinate Judge, Poonamallee, thereby confirming the judgment and decree dated 21.3.2001 rendered in O.S.No.243 of 2000 by the learned District Munsif, Poonamallee.

For appellant : Mr.V.Subramani
For respondent : Mr.K.Premkumar

JUDGMENT

Under the impugned judgments, rendered by the Courts below, the defendant/appellant was directed to deliver possession, which caused grievance and the result is this Second Appeal.

2. The parties are referred to as per their ranking in the original suit.

3. The respondent/plaintiff is the owner of the suit property, which was leased out to the defendant/appellant, on his agreeing to pay a monthly rent of Rs.1,150/=. The plaintiff, being the owner, requested the defendant/appellant to vacate the premises, by issuing notice and terminating the tenancy, since the property is required for his personal occupation, not conceded by the defendant/appellant, resulting the suit.

4. The defendant/appellant, admitting the tenancy, as monthly one, as well as agreeing the monthly rent also at Rs.1,150/=, opposed the claim, contending that the suit property is not required for the additional accommodation of the landlord or for her personal

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occupation and if the defendant is evicted, she will be deprived of the livelihood, since she is surviving only on the business conducted in the suit premises.

5. The defendant further alleging, that her possession is likely to be disturbed, has also filed the suit for bare injunction in O.S.No.206 of 2000 against the landlord, which was opposed.

6. The trial Court, by the common judgment dated 21.3.2001, dismissed the suit filed by the appellant/defendant in O.S.No.206 of 2000 and decreed the suit filed by the landlord, ordering eviction of the defendant/appellant. The appellant, who is the plaintiff in O.S.No.206 of 2000, has not preferred any appeal, as said before this Court, against the verdict in O.S.No.206 of 2000, whereas she has preferred the appeal only against the judgment and decree rendered in O.S.No.243 of 2000 before the first appellate Court in A.S.No.44 of 2001.

7. The learned Subordinate Judge, considering the short point involved in this case viz. was there proper termination of the tenancy, felt, that the requirement of Section 106 of the Transfer of Property Act is fully complied with and this being the position, there is no other defence available to the tenant and in this view, confirming the decree and judgment of the trial Court, the appeal came to be dismissed on 26.7.2003, which is impugned in this Second Appeal.

8. This Court, while admitting the Second Appeal, had formulated the following Substantial Questions of Law:

"1. Whether the suit is maintainable?
2. Whether there is a valid notice to quit in terms of Section 106 of the Transfer of Property Act?
3. Whether the notice to quit under Ex.A.1 is valid when there is contract stipulation three months notice for termination of tenancy?"

9. Heard Mr.V.Subramani, learned counsel for the appellant and Mr.K.Premkumar, learned counsel for the respondent.

10. Mr.V.Subramani, learned counsel appearing for the appellant, would submit that in this case, there is an agreement between the landlord and tenant, contemplating three months notice and this being the position, when, admittedly, no notice has been issued terminating the tenancy, giving three months, the suit filed itself is not maintainable, deserves to be dismissed, but unfortunately, especially the first appellate Court, before whom this point was urged, has not considered the materials at all, resulting injustice and therefore, the interference of this Court is an absolute necessity.

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11. The learned counsel for the respondent/landlord would argue, responding to the above said submission of the learned counsel for the appellant/tenant that in this case, there was no pleading challenging the notice; that as per the case of the parties before the Courts below, it is only a monthly tenancy based on oral tenancy, which was properly terminated; that even assuming that there was a rental agreement between the landlord and tenant, the period fixed therein for lease, extinguished by efflux of time and therefore, no notice is necessary, to maintain the suit. It is the further submission of the learned counsel for the respondent that after the expiry of the period contemplated in the rent deed, the tenant will not come within the meaning of a "tenant holding over" and therefore, he is not entitled to the benefits of either Section 116 or Section 106 of the Transfer of Property Act. In support of the above submission, inviting my attention to the judgment of the Apex Court in SHANTI PRASAD DEVI AND ANOTHER vs. SHANKAR MAHTO AND OTHERS (2005 AIR SCW 3359),it was urged that the eviction order, concurrently favoured by both the Courts below, in favour of the respondent/plaintiff, should be accepted by this Court also.

12. There is no dispute between the parties regarding the relationship viz. landlord and tenant. Though an attempt is made abortively, to say, since the suit is filed after the lease period is over, the tenant may not be entitled to the benefits of Section 106 of the Transfer of Property Act. The suit is filed treating the defendant/appellant only as tenant, valuing the suit also under Section 43(1) of the Tamil Nadu Court Fees and Suits Valuation Act, which contemplates the suit between landlord and tenant. Therefore, the suit is one for eviction, based upon tenancy and in this view, to maintain the suit, there must be termination of tenancy.

13. The appellant, when A.S.No.44 of 2001 was pending before the first appellate Court, filed a petition, invoking Order 41 Rule 27 CPC, in I.A.No.75 of 2002, for reception of additional evidence, viz. the rental agreement dated 1.8.1994. That petition was allowed, ordering to receive the document, as seen from the order available in I.A.No.75 of 2002, dated 28.8.2002. The first appeal was disposed of on 26.7.2003. The first appellate Court, having allowed the petition under Order 41 Rule 27 CPC, ordering to receive the document filed along with that petition, should have considered the effect of that document, irrespective of the plea of the parties before the trial Court. The order, allowing I.A.No.75 of 2002, was not challenged and therefore, it reached finality also. But, unfortunately, the first appellate Court has not considered the document at all and the grievance raised before this Court viz. that the first appellate Court has committed an error, in not discussing the rental agreement, appears to be legally well-founded and it requires effective consideration also. If that document proves different tenancy, or

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under the said document, there was some condition regarding the eviction and notice, that should be given effect to, instead of going for Section 106 of the Transfer of Property Act, which would come into operation, if there is no contract between the parties. In view of the fact that the first appellate Court has not considered the document file along with I.A.No.75 of 2002, that was sent for and the document is also available. Therefore, that should be taken into consideration by this Court, since there was failure of justice, while delivering the judgment by the first appellate Court, in not considering the documentary evidence, which is not challenged before me also.

14. The document filed along with the above I.A., is a rental agreement entered into between the appellant/defendant and the plaintiff, wherein the appellant is described as lessor and the respondent is described as lessee. This document is dated 1.8.1994. No case has been projected before me, that the respondent is not a signatory to this document. In view of the fact that the order in I.A.No.75 of 2002 on the file of the first appellate Court is not challenged, it should be taken that this document is an admitted one. This document is in respect of the suit property, not in dispute. This document contemplates, how tenancy should be terminated, which reads:

> "It is mutually agreed that either party shall given three months notice, in writing, for termination of the lease"

Based upon the above clause (clause 15), the learned counsel for the appellant would submit that the notice, terminating the tenancy, issued prior to the suit, giving 15 days time, is not in accordance with the written agreement and therefore, the suit filed for eviction should be rejected, which deserves acceptance, in my considered opinion.

15. Section 106 of the Transfer of Property Act commences, 'in the absence of a contract or local law or usage to the contrary' and depending upon the use of the demised premises, a notice should be issued, terminating the tenancy, by giving six months notice or by giving 15 days notice. This Section will come into operation only 'in the absence of a contract', thereby showing, if there is a contract, between the parties, contemplating as to how the tenancy should be terminated, that alone shall prevail. As adverted to above, as per the contract entered into between the parties, under a registered document dated 1.8.1994, the parties have agreed themselves to terminate the tenancy, giving three months notice, in writing. Admittedly, no three months notice has been given, terminating the tenancy. In this view of the matter, it should be held, the suit filed, without terminating the tenancy properly, is not maintainable.

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16. It is not known, how the parties have proceeded before the Courts below, as if the tenancy is oral, no document. When the document is produced, not challenged and therefore, despite the fact that the parties have taken originally a stand, as if there was no written lease, in view of this admitted document, the case should be decided on this position, ignoring the pleadings, which are ignorantly pleaded against the admitted facts.

17. The learned counsel appearing for the respondent would submit that even assuming that the lease agreement contemplates three months notice in writing, at present, no notice is necessary, for maintaining the suit for ejectment, since the period contemplated therein already expired by efflux of time and this being the position, the tenant should be labelled as 'tenant by sufferance', who is not entitled to any notice. As per clause (2) of the agreement of lease, the period of tenancy is only for 11 months, with liberty to renew the same for further period of two terms, thereby extending the lease only for maximum of another 22 months, in two spells. That period would have come to an end, by 30.4.1997. The suit was filed in the year 2000. On the above position, it was urged that no notice is necessary and the suit can be filed, since the period contemplated under the lease is already expired, even taking the renewal period, though not actually renewed.

18. Repelling the above submissions, the learned counsel for the appellant would submit that the appellant/defendant continues to be a tenant even now, he being a 'tenant holding over', falling within the ambit of Section 116 of the Transfer of Property Act and this being the position, he is entitled to a notice of 3 months, as per the contract entered into between the parties on 1.8.1994. Therefore, we have to see, whether the appellant/defendant is a 'tenant holding over' or he is a 'tenant by sufferance'. If he is a tenant by sufferance, he may not be entitled to a notice, whereas if he is a tenant holding over, he would have the benefit of the original conditions, which was agreed between the parties.

19. Section 116 of the Transfer of Property Act reads:

> "If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106."

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20. As indicated above, Section 106 of the Transfer of Property Act says 15 days notice is necessary in the case of monthly tenancy only in the absence of a contract. If contract is available, then, tenancy should be terminated accordingly. The period of lease, though expired, admittedly, the defendant/appellant alone continues to be in possession of the property. As adverted to above, the plaintiff himself, describing the defendant/appellant only as tenant, filed the suit for eviction that too, after terminating the tenancy, thereby clearly showing that the plaintiff himself had treated the defendant only as a tenant, which should come within the meaning of 'tenant holding over', since the period of tenancy is already expired. If the defendant is not a tenant holding over, or if he is a tenant by sufferance, there would not have been any necessity for the petitioner to terminate the tenancy and to file a suit for ejectment, valuing the suit under Section 43 of the Tamil Nadu Court Fees Act, recognising the existing relationship of landlord and tenant.

21. The learned counsel appearing for the respondent/plaintiff, inviting my attention to the decision of the Apex Court in SHANTI PRASAD DEVI AND ANOTHER vs. SHANKAR MAHTO AND OTHERS (2005 AIR SCW 3359), would submit that after the period of lease expired, even the payment of rents were accepted by the lessor, the person who is in possession of the property, in continuation of the tenancy, cannot come within the meaning of 'tenant holding over', attracting Section 116 of the Transfer of Property Act. In the case involved in the above decision, as seen from the facts of the case, the period of lease expired on 17.7.1997. After the expiry of period of lease, the lessee continued to remit the rent and issued a lawyer's notice also, exercising the option to renew the lease. The option must be before the expiry of the initial period i.e. in that case, on or before 17.7.1997, but it seems, after that period is over, option was exercised, rejected. When the suit was filed, it was contended, the tenant is continuing in possession, as tenant holding over and therefore, he is entitled to renew the lease also, automatically, which was repelled on the ground that "mere acceptance of rent by the lessor on expiry of original period of lease, for use and occupation of the leased premises by the lessee, did not signify 'assent' of the lessor to the continuance in possession of the lessee so as to infer deemed renewal of the lease under Section 116 of the Transfer of Property Act", which dictum may not be applicable to the facts and circumstances of the case on hand.

22. In the case on hand, after the expiry of lease period, no renewal was sought for. The erstwhile admitted tenant was paying the rent regularly, accepted by the landlord also. Thus, admitting the rent and recognising that he continues to be a tenant, a notice was also issued, terminating the tenancy. The above conduct of the landlord, certainly, would attract the ingredients of Section 116 of

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the Transfer of Property Act, since this Sections says "if a lessee remains in possession, after the termination of the lease and the lessor accepts the rent from the lessee or otherwise assents to continue to be in possession, he should be considered as tenant holding over". In the case on hand, as said above, not only by the acceptance of the rent periodically, but also by issuing a notice under Ex.A.1, the defendant was described as a tenant, which would amount to 'assent' to the tenant's continuing in possession. If there is no acceptance of rent and there is no recognition by the issue of notice, then only, the Ruling of the Apex Court, relied on by the learned counsel for the respondent, would be applicable, compelling this Court to reject the defence, which is not available here.

23. A three judge bench of the Apex Court, in BADRILAL vs. MUNICIPAL CORPORATION OF INDORE (AIR 1973 SC 508), had considered the point, 'whether a tenant, whose period expired by efflux of time, would come within the meaning of 'tenant holding over' or 'tenant by sufferance'. In the case involved in the above decision, the tenant had deposited the rent and the Municipal Commissioner therein accepted the same and on that basis, it was urged that the person, who is in possession, should be deemed to be 'a tenant holding over', which was considered in extensive, relying on the previous decisions of various Courts. Reiterating the position of law, enunciated in KAI KHUSHROO BAZONJEE CAPADIA vs. BAI JERBAI HIRJIBHOY WARDEN (1949 FCR 262 = AIR 1949 FC 124), the same was approved, which reads:

> "On the determination of a lease, it is the duty of the lessee to deliver up possession of the demised premises to the lessor. If the lessee or a sub-lessee under him continues in possession even after the determination of the lease, the landlord undoubtedly has the right to eject him forthwith; but if he does not and there is neither assent or dissent on his part to the continuance of occupation of such person, the latter becomes in the language of English law a tenant on sufferance who has no lawful title to the land but holds it merely through the laches of the landlord. If now the landlord accepts rent from such person or otherwise expresses assent to the continuance of his possession, a new tenancy comes into existence as is contemplated by Section 116, Transfer of Property Act, and unless there is an agreement to the contrary, such tenancy would be regarded as one from year to year or from month to month in accordance with the provisions of Section 116 of the Act."

Therefore, from the above passage, it is clear, if the landlord accepts rent from the person or otherwise expresses assent to the continuation of his possession, a new tenancy comes into existence.

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As contemplated under Section 116 of the Transfer of Property Act, in order to bring a man within the ambit of Section 116 of the Transfer of Property Act, there should be payment of rent, after the tenancy is over; that the rent should be accepted, without any protest and that there should be assent. On facts, in the case on hand, all the above said three ingredients are well available, as said repeatedly. Therefore, the plaintiff is not entitled to say that the defendant is a 'tenant by sufferance', not entitled to any notice or the tenancy came to an end, by efflux of time and such person is not entitled to any notice. Unfortunately, the plaintiff, describing the defendant as tenant alone, has filed this suit, terminating the tenancy, which is not in accordance with the agreement between the parties, though the same is in accordance with Section 106 of the Transfer of Property Act as if not contract. Thus, considering the rental written agreement, now available, though the same was allowed by the first appellate Court, not considered by him, it should be held, that there is a contract of lease under which the parties have agreed to issue three months notice, in writing, and this being the position, since admittedly, no three months notice has been issued, the suit filed, as such, is not maintainable.

24. For the above reasons and in the light of the above discussion, it should be held, the suit is not maintainable, since there is no valid notice as per the contract, wherein the defendant is entitled to three months notice, terminating the tenancy, answering the substantial questions of law accordingly.

In fine, the result is, the appeal is allowed, setting aside the decrees and judgments of both the Courts below, and dismissing the suit in O.S.No.243 of 2000 on the file of the Court of District Munsif, Poonamallee.

Considering the peculiar circumstances of the case, the parties are directed to bear their respective costs, throughout.

Rao

Sd/-
Asst. Registrar

//true copy//

Sub Asst.Registrar

To

1. The Subordinate Judge, Poonamallee.
2. The District Munsif, Poonamallee.
3. The Record Keeper, VR Section, High Court, Madras.

+ 1 CC to Mr.V.Subramani, Advocate Sr.No.38020.
+ 2 Ccs to Mr.M.Vijayanand, Advocate Sr.No.37940.

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